Filed 10/18/04 In re Audrey H. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re AUDREY H., a Person Coming Under the Juvenile Court Law.	
DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. MICHAEL H. et al, Defendants and Appellants.	E035970 (Super.Ct.No. J191882) **OPINION**

APPEAL from the Superior Court of San Bernardino County. A. Rex Victor, Judge. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant Michael H.

Marsha Faith Levine, under appointment by the Court of Appeal, for Defendant and Appellant Victoria H.

Ronald D. Reitz, County Counsel, and Dawn Stafford, Deputy County Counsel, for Plaintiff and Respondent.

Sharon M. Jones, under appointment by the Court of Appeal, for Minor.

Michael H. (the father) and Victoria H. (the mother) appeal from an order denying their "changed circumstances" petitions (Welf. & Inst. Code, § 388 (section 388)) and terminating their parental rights to their baby daughter, Audrey H. The juvenile court denied the petitions because it found no changed circumstances and because it found that granting the petitions would not be in the best interest of the child. It terminated parental rights because it found, among other things, that the "parental relationship exception" (Welf. & Inst. Code, § 366.26, subd. (c)(1)(A)) did not apply.

These findings were supported by substantial evidence and well within the juvenile court's discretion. Accordingly, we will affirm.

I

GENERAL FACTUAL AND PROCEDURAL BACKGROUND

The mother and father are married. The father's five children from a previous relationship lived with him. In June 2001, the parents were provided with voluntary family maintenance services.

In June 2001, the mother and father's first child together -- a daughter -- was born. Because she was found to be drug-exposed, she was detained; a dependency petition was filed and sustained, and reunification services were provided.

In December 2001, due to the father's history of substance abuse and his failure to provide his five older children with shelter, medical treatment, and schooling, they, too, were detained. Additional dependency petitions were filed and sustained, and once again reunification services were provided. One or more of the children were returned but had to be removed again after new incidents of domestic violence.

In May 2003, reunification services as to all six children were terminated. In September 2003, the five older children were placed in long-term foster care, and parental rights to the youngest girl were terminated. The youngest girl was adopted by Mr. and Mrs. P.

In November 2003, Audrey was born. She was premature but apparently not drug-exposed. While in the hospital, the mother admitted a history of substance abuse. She also admitted using methamphetamine in September 2003, during her pregnancy. She admitted engaging in ongoing domestic violence with the father, stating "he has hit her and she also hits him." Recently, the mother had left the father and had gone to stay in a domestic violence shelter. Otherwise, however, both parents were homeless.

As a result, immediately after Audrey was born, she was detained, and the present dependency proceeding was filed. As relevant here, it alleged jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)), in that both parents had a substance abuse "problem" and had repeatedly engaged in mutual domestic violence, and based on abuse of a sibling (Welf. & Inst. Code, § 300, subd. (j)), in that Audrey's older

sister and her five older half-siblings had previously been removed from the parents, and the parents had failed to reunify with them.

When interviewed, the father admitted "indulg[ing]" in methamphetamine and marijuana for a year. He also admitted domestic violence, though he stated: "I don't hit her at all, she is the one that hits me. . . . I probably have said some things that make her upset or are hurtful."

In January 2004, at a contested jurisdictional/dispositional hearing, the juvenile court sustained the foregoing allegations of the petition and formally removed Audrey from her parents' custody. It denied reunification services, based on failure to make a reasonable effort to treat the problems that led to removal of the siblings (Welf. & Inst. Code, § 361.5, subds. (b)(10), (b)(11)), and it set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

In February 2004, Audrey was placed with the P.'s. The P.'s were reportedly "very excited about the possibility of adopting Audrey and keeping the two siblings together."

The section 366.26 hearing was originally set for April 30, 2004. On that date, the parents requested a contested hearing; they also declared their intention of filing section 388 petitions. As a result, the section 366.26 hearing was continued to May 24, 2004.

On May 11, 2004, the parents filed petitions pursuant to section 388. In them, they asked the juvenile court to grant them reunification services and to vacate the section 366.26 hearing.

On May 24 and 25, 2004, the juvenile court held a combined section 388 and section 366.26 hearing. After taking evidence, it denied both section 388 petitions and terminated parental rights.

II

EVIDENCE AT THE HEARING

The evidence before the juvenile court at the combined section 388 and section 366.26 hearing -- consisting of the section 388 petitions themselves, two social worker's reports, an adoption assessment, and the oral testimony of the social worker and the parents -- showed the following.

The father was "clean and sober." He had completed an inpatient alcohol recovery program at Gibson House for Men, then entered a sober living home. He had been attending Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings regularly since January 2004. He was attending (but had not completed) parenting and domestic violence classes. Out of 10 domestic violence class sessions, he had missed the first two, attended four, and had four left to go.

He admitted that he had been a drug addict for 12 years. He also admitted that in 2002, as part of his reunification services plan in connection with his other children, he had completed a six-month drug treatment program. When asked why, despite having those children removed from his custody three years earlier, "it's taken so long for you to get to the programs that were set out for you . . . to get your kids back," he replied: "We

had problems with one of the [social] workers. One of the workers got fired, did something wrong in the case, then ever since then things turned around."

The mother testified that she had been "clean and sober" for eight months, i.e., since using drugs during her pregnancy. She had completed an inpatient drug treatment program at Gibson House for Women, then entered an aftercare program, also at Gibson House. While she was there, however, money and other items were stolen from her and from others. She complained to the social worker, who advised her not to leave but to raise the issue within the program instead. Nevertheless, because of the thefts -- though also, the mother testified, because "they confronted me that I was acting weird and this and that" -- she left. She went to the same sober living home the father was in. Thus, they were in the same house, though not the same room.

She had been attending AA/NA meetings regularly since December 2003. A drug test in April 2004 had been negative. She had a part-time job that paid $20 or $30 a day. She was attending (but had not completed) parenting and domestic violence classes. She had missed the first session of the domestic violence class, attended five, and had four left to go. She admitted that she had completed a 52-week domestic violence program once before, in April 2003. When the juvenile court noted that she was still "having domestic violence problems" in November 2003, when Audrey was born, she claimed, "[t]hat was verbal abuse."

The record established that the mother and the father were in the same domestic violence class. Nevertheless, the mother was evasive on this point:

"Q The domestic violence program you're doing now, that is together with [the father], correct?

"A No, it's not.

"Q You don't see him there during the domestic violence program?

"A That class is only there from 1 to 5. We roll at different times. What [the father] does is his business. But he's in the class, yes. He attends there."

In November 2003, the mother had broken the rules of the shelter she was then in by contacting the father.

The social worker did not believe the parents had overcome their domestic violence problem. She saw the mother's "inability to stay away from" the father as "repetitive behavior in the cycle of domestic violence."

The parents had visited Audrey separately but consistently, once a week, for two hours at a time. During visits, the father testified, "I hold her, feed her, change her, walk around with her. I talk to her . . . . I put her on the floor, see if she crawls." In the father's opinion, he and Audrey "ha[d] a bond." On the other hand, in the social worker's opinion, the parents did not spend enough time with her to have begun bonding with her; the father "ha[d] a misunderstanding of child development in that he equate[d] however Audrey respond[ed] to him as they are bonding." She did apparently concede, however, that the father had "served as [a] parental figure throughout the life of this child[.]"

As of the hearing, Audrey had been with her prospective adoptive parents for over three months. The transition had been "smooth and uneventful." The social worker believed Audrey was "very bonded" with the prospective adoptive parents. Audrey's older sister also appeared "very bonded" with her and "very protective of her." She was "being provided with constant care and nurturing," as well as "appropriate affection and physical closeness . . . ."

III

THE DENIAL OF THE SECTION 388 PETITIONS

Both parents contend the juvenile court erred by denying their section 388 petitions.

A. *The Juvenile Court's Ruling*.

The juvenile court ruled: "I recognize the thought[-]to[-]be dilemma of the parents. I see the parents in a Catch 22 situation [in] that because of their previous actions vis-a[-]vi[s] the other children, . . . they weren't offered services as to this child. And, also the child being a new born [*sic*] with no reunification services their opportunity to bond and care for the child w[as] necessarily limited.

"But this was a process the parents put in motion, not the court, certainly not the children. . . . [¶] . . . [¶]

"I do find it disturbing that mother would leave the program she was in to join father in another program. And if she did decide to change a program, the coincidence that she entered a program where the father was is somewhat surprising. And that gives

me pause, as . . . I think [the] underlying implication is that it's a further indication of the codependency that we find so often in domestic violence cases.

"I can't help but note that the mother was using drugs in the course of [her] pregnancy [with] this child . . . .

"I think it's fair to say . . . that [the] parents belatedly are changing but I don't think the circumstances have changed.

"[T]he thought[-]of best interest of the child is the biological parents relationship . . . continuing that relationship seems to be by implication the best interest of the child. But I don't think that comes close to weighing against the child's stability and permanency. [¶] [S]he's in a warm, loving and stable environment that holds great promise that she'll be raised in a loving and nurturing home."

It concluded: "I find that neither parent has met their burden of proof. [¶] I find circumstances are changing but not changed. [¶] And, I find it is not in the best interest of the child to offer reunification services at this time to the parents or to return the child to the parents."

B. *Analysis*.

Under section 388, "[t]he juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child's best interests. [Citations.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability. . . . The burden

thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*In re Marilyn H*. (1993) 5 Cal.4th 295, 309.)

As one court recently cautioned, "[t]he denial of a section 388 motion rarely merits reversal . . . . [Citation.]" (*In re Amber M*., *supra*, 103 Cal.App.4th at pp. 685-686.) "The petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. [Citations.]" (*In re Jasmon O*. (1994) 8 Cal.4th 398, 415-416.) " . . . 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.[]' [Citation.]" (*In re Stephanie M*. (1994) 7 Cal.4th 295, 318-319, quoting *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272, quoting *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.)

The juvenile court denied the petitions on two alternative grounds. First, it found no changed circumstances; the "circumstances [we]re changing but not changed." Second, it found that granting the petitions would not be in Audrey's best interest. As long as one or the other of these findings is supported by the record, we must affirm.

The fact that the relevant circumstances were changing rather than changed is a well-recognized reason for denying a section 388 petition. (*In re Casey D*. (1999) 70 Cal.App.4th 38, 49.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some

future point, does not promote stability for the child or the child's best interests. [Citation.] '"[C]hildhood does not wait for the parent to become adequate."' [Citation.]" (*Id*. at p. 47, quoting *In re Baby Boy L*. (1994) 24 Cal.App.4th 596, 610.)

The juvenile court could reasonably find that, although the parents were addressing their substance abuse problems, they had not eliminated them. They merely showed that they had been in treatment for six months. "[R]elapses are all too common for a recovering drug user." (*In re Cliffton B*. (2000) 81 Cal.App.4th 415, 423.) Six months of sobriety does not necessarily show real reform. (*Ibid*. [200 days]; *In re Kimberly F*. (1997) 56 Cal.App.4th 519, 531, fn. 9 [120 days].)

The father had been a drug addict for at least 12 years. Despite completing a drug treatment program in 2002, throughout 2003 he admittedly "indulged" in methamphetamine and marijuana. At Gibson House, he had taken an alcohol recovery program, not a drug treatment program. Similarly, the mother had been unable to abstain from drug use even during pregnancy. Given this history, the juvenile court did not have to be convinced that they had put substance abuse behind them.

The juvenile court likewise could reasonably find insufficient evidence that the parents had overcome their history of domestic violence. The only evidence they offered on this point was that they were taking a domestic violence class. However, they had both missed sessions of the class, and neither of them had completed it. Previously, the mother had completed a 52-week-long domestic violence program, yet apparently she

had not learned much from it. Also, even though the mother evidently understood and accepted the need to stay away from the father, she never actually managed to do so.

Finally, it would be almost impossible to overstate the significance of the parents' failure to reunify with their other children. According to the father, after losing custody of them, both parents completed their reunification services plans, and the children were returned to them. Obviously, however, those services did not stick, as the children were removed again, and this time, for good. Thus, merely partaking of services was hardly a changed circumstance.

The parents' neglect of these other children, and their failure to reunify with them, was another one of the problems that led to the dependency. Audrey's half-siblings had been removed from the father's custody (and, de facto, the mother's) due to failure to support and provide for them. Both parents, however, were still essentially homeless; although they were in a sober living home, it does not appear that they could have had Audrey there with them, and eventually they would have had to leave. They were not making a living. There was no reason to think they would be able to support and provide for Audrey.

Even assuming the parents did demonstrate changed circumstances, they also had to demonstrate that granting the petitions would be in the best interest of the child. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.) This they wholly failed to do. As the juvenile court observed, they were asking it to assume that it is *always* in a child's best interest to be in the custody of his or her natural parents. But this is not true, as a matter

of fact or of law. To the contrary, after the reunification period, "there is a rebuttable presumption that continued foster care is in the best interest of the child [citation]; such presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care." (*In re Angel B*. (2002) 97 Cal.App.4th 454, 464.)

Indeed, the facts in *Angel B*. are strikingly similar to those here. The juvenile court denied reunification services. Later, the mother filed a section 388 petition. She showed that she had enrolled in a drug treatment program, drug tested satisfactorily, completed parenting and anger management classes, participated in counseling, gotten a job, and visited regularly. The juvenile court not only denied the petition, but did so without a hearing. (*In re Angel B*., *supra*, at p. 459; see also *id*. at pp. 461-462.)

The appellate court sustained the denial because the mother had not shown that the requested modification would promote the best interests of the child. (*In re Angel B*., *supra*, 97 Cal.App.4th at pp. 464-465.) "[I]t is difficult to imagine how she could have done so, given the fact that Mother never actually parented Angel before her removal, and Angel was immediately placed with an adoptive family and her own sibling. Angel was removed from Mother's custody directly from the hospital, just two days after her birth. She was placed with a family that was not only in the process of adopting her older sibling, Robert, but that also was successfully parenting two biological children and two other adopted children (a sibling set), and that wanted to adopt Angel as well . . . . The parents in this family clearly, by deed if not by name, were Angel's parents. They, not Mother, provided Angel with all the day-to-day, hour-by-hour care needed by a helpless

infant and then growing toddler. Thus, although Mother's petition states that she has bonded with Angel, and that Angel is happy to see her and reaches for her on their visits, such visits, in total, add up to only a tiny fraction of the time Angel has spent with the foster parents. On this record, no reasonable trier of fact could conclude that the bond, if any, Angel feels toward Mother . . . is that of a child for a parent." (*Id*. at p. 465.)

Here, almost identically, Audrey was removed from her parents' custody virtually at birth. Although not placed with the prospective foster parents immediately, she had been placed with them for over three months, and she was already "very bonded" with them. Also, significantly, the prospective foster parents had already adopted Audrey's older sister, and the two girls were likewise "very bonded . . . ." Finally, in addition to the facts shown in *Angel B.*, here both of the parents were homeless and unemployed. It is almost inconceivable that, under these circumstances, it would be in Audrey's best interest to postpone her adoption by the P.'s.

We conclude that the trial court's denial of the section 388 petitions, on either or both of its alternative grounds, was not an abuse of discretion.

IV

THE PARENTAL RELATIONSHIP EXCEPTION

The father also contends the juvenile court erred by refusing to find that the "parental relationship" exception to termination applied (§ 366.26, subd. (c)(1)(A)) -- i.e., that termination of parental rights would be detrimental to Audrey. This "may be the most unsuccessfully litigated issue in the history of law . . . . And it is almost always a

loser." (*In re Eileen A*. (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S*. (2003) 31 Cal.4th 396, 413.) Here, once again, it meets its usual fate.

In general, at the section 366.26 hearing, if the court finds that the child is adoptable, it must select adoption as the permanent plan; to that end, it must terminate parental rights. (§ 366.26, subds. (b)(1), (c)(1).) This rule, however, is subject to five statutory exceptions. (§ 366.26, subds. (c)(1)(A)-(c)(1)(E).) The relevant one here is the "parental relationship" exception. It applies when "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subds. (c)(1)(A).) The burden of proving that an exception applies is on the parent. (*In re Jamie R*. (2001) 90 Cal.App.4th 766, 773; *In re Autumn H*. (1994) 27 Cal.App.4th 567, 574.)

"We have interpreted the phrase 'benefit from continuing the relationship' to refer to a 'parent-child' relationship that 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the

natural parent's rights are not terminated.' [Citations.]" (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953, quoting *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

"[T]he parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.]' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954, quoting *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

During the section 366.26 hearing, the father's counsel stated, " . . . I would ask the court to consider . . . my client's testimony regarding his relationship with Audrey." The juvenile court responded, "I don't find [the] father's testimony of a bond with Audrey credible."

We need not be overly concerned about the appropriate standard of review. (Compare *In re Cliffton B.*, *supra*, 81 Cal.App.4th at p. 425 [substantial evidence test] with *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [abuse of discretion].) The only evidence that the father had a beneficial relationship with Audrey consisted of his own testimony that he and Audrey "ha[d] a bond," plus the social worker's apparent concession that he had "served as [a] parental figure . . . ." The juvenile court could and did reject this evidence. The father's two hours a week with Audrey simply was not enough time to establish a parental relationship with an infant. Also, in the social

worker's opinion, the father and Audrey had not bonded; he did not even understand what bonding was. There was no evidence that terminating the father's parental rights would harm Audrey in any way, much less harm her "greatly." As against this, there was ample evidence that Audrey was "very bonded" with her new family.

In this light, the juvenile court's refusal to find that the parental benefit exception applied was not only supported by substantial evidence but also within its discretion.

V

DISPOSITION

The order appealed from is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

GAUT
J.